

Supreme Court, U. S.
FILED

FEB 14 1979

MICHAEL RUDAK, JR., CLERK

**In The
Supreme Court of the United States**

OCTOBER TERM, 1979

No. 78-1266

EUGENE HUGH MATHIAS,
Petitioner,

v.

STATE OF MARYLAND

**PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND**

Claude L. Callegary
415 St. Paul Place
Baltimore, Maryland 21202
Phone: 301-727-1365
Attorney for Petitioner

INDEX

Opinions Below	page 1
Jurisdiction	2
Question Presented	2
Constitutional Provision and Rule Involved ...	2-3
Statement of the Case	3-6
Reasons for Granting Writ	6-13
Conclusion	13
Appendix A:	
Opinion of the Court of Appeals of Maryland of November 17, 1978	14-26
Appendix B:	
Opinion of the Court of Special Appeals of Maryland of April 17, 1978	27-36
Appendix C:	
Oral opinion of the Circuit Court for Harford County, Maryland	37-39

TABLE OF CASES

Ballew v. Georgia, 98 S.Ct.1029 (1978)	12
<u>Chapman v. State of California</u> , 386 U.S.18, 87 S.Ct.824 (1967)	11
<u>Dorsey v. State</u> , 276 Md.638, 350 A.2d.665 (1976)	11, 12
<u>Duncan v. State of Louisiana</u> , 391 U.S.145, 88 S.Ct.1444 (1968)	6, 12

STATUTE

Courts and Judicial Proceedings, Maryland Code, Sec. 1-503	10
---	----

MISCELLANEOUS

Maryland Manual 1977-1978	10
---------------------------------	----

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. _____

EUGENE HUGH MATHIAS,
Petitioner,

v.

STATE OF MARYLAND

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF
APPEALS OF MARYLAND

To the Honorable, the Chief Justice and
Associate Justices of the Supreme Court of the
United States:

Eugene Hugh Mathias, Defendant and
Appellant below, the Petitioner herein, prays that
a writ of certiorari issue to review the judgment
of the Court of Appeals of Maryland entered by its
mandate of December 22, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals of
Maryland, whose judgment is herein sought to be
reviewed, was filed on November 17, 1978 and
reported in _____ Md. _____, _____ A.2d. _____
and is reproduced in Appendix A, pp. 14-26.

The opinion of the Court of Special
Appeals of Maryland is reported in 39 Md.App.291,
84 A.2d.482 and is reproduced in Appendix B, pp.
27-36.

The opinion of the Circuit Court for
Harford County, Maryland, unreported, is reproduced
in Appendix C, pp. 37-39.

JURISDICTION

The judgment of the Court of Appeals of Maryland is evidenced by its mandate entered on December 22, 1978. The jurisdiction of the Court is pursuant to 28 U.S.C. Sec. 1257 (3).

QUESTION PRESENTED

Whether the Maryland courts improperly denied Petitioner a trial by jury in his criminal case by refusing to allow him to change his earlier election of a court trial after he learned that a "co-defendant" was going to testify against him.

CONSTITUTIONAL PROVISION AND RULE INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

And it involves then Rule 741 of the Maryland Rules of Procedure as in force at the time of his trial, which provides:

An accused may elect to be tried by jury or by the Court. Such election shall be made by the accused

in open court when first called upon to plead after he is represented by counsel of record, or has waived counsel. If an accused elects to be tried by the Court, the State may not elect a jury trial. The Court may in its discretion and for good cause shown, at any time prior to trial permit the accused to change his election.

STATEMENT OF THE CASE

This is a criminal case in which the Petitioner was indicted on September 15, 1976 for four counts of allegedly violating provisions of the narcotics laws of the State of Maryland.

Petitioner was arraigned in the Circuit Court for Harford County on October 5, 1976 and at that time he "elected trial by court and entered a plea of Not Guilty".

On November 9, 1976 an addendum was filed to the indictment by which the Petitioner was charged as a second offender.

One Phillip Douglas Deal was an unindicted co-conspirator in the Petitioner's case. He was referred to in the state courts as a "co-defendant" and the parties stipulated below that Deal had been separately indicted for substantive offenses arising under the Maryland narcotics statutes. Deal and the Petitioner were both arraigned on October 5, 1976.

Petitioner's case was not scheduled for trial until June 9, 1977. It was postponed due to a conflict in the schedule of Petitioner's counsel and trial was reset for June 29, 1977.

Immediately at the outset of the proceeding, Petitioner's counsel sought a jury trial. Counsel represented that only "early of last week" the defense was notified by the State's Attorney's office that Deal "was pleading" to two counts. It was further represented that not until the morning of trial did Petitioner's counsel learn of the extent of Deal's testimony "and how deeply prejudicial" it would be. This was learned from a Mr. Walker (the record infers that he was counsel for Deal) and Petitioner's counsel indicated next that there was no indication "until late Thursday that there was going to be a plea" and the extent of Deal's testimony was not known until the morning of trial. Petitioner's counsel asserted that he had no previous opportunity in that time span to talk to Deal's attorney. The day of trial was a Wednesday, so that late "last Thursday" left three weekdays before the day of trial.

The State of Maryland opposed the request by asserting, through counsel, that there was no jury present; if there had been "a day or two notice" a jury could have been present; and "I believe the court's calendar ... has been filled up approximately six weeks in advance. It usually is ..." and a delay of "six or eight weeks" was opposed.

The State also represented that a witness had flown in from Pittsburgh "just an hour ago". The witness was a former police officer who "came voluntarily to us at our expense". Counsel for your Petitioner had offered, as part of his motion, that "... perhaps we could stipulate to that one witness who I understand is from out of town, what his testimony would be". This suggestion was never pursued by the State or the trial judge.

There was no evidentiary hearing on the request. The trial court orally ruled that the motion was made in good faith, that there was no certainty that the out-of-town witness would be

available, the case would have to be postponed for six to eight weeks, and the court saw no prejudice to the Petitioner. The trial judge indicated that the case would not be determined "... on whether or not the co-defendant pleaded guilty". See Appendix C. Trial on the merits then commenced and the witness in question, James Lee, testified that he had just graduated from law school at Wake Forest, North Carolina. He gave his address as Cheswick, Pennsylvania -- near Pittsburgh -- but later said that he was not "living" there. He had no plans to leave the country and stated that he could return to Maryland to testify..

Petitioner was convicted on two counts with the trial judge referring to the "positive testimony" of the "co-defendant" Deal, and Petitioner received sentences of four and three years to run concurrently.

A direct appeal to the Court of Special Appeals of Maryland was heard by a three member panel, and his convictions were affirmed by a 2 to 1 decision. The majority ruled that there was "inconvenience to the State and to the out-of-state witness" coupled with a week's notice as to the change of position by the co-defendant, an "interruption of the orderly administration of justice, and no prejudice to appellant was shown". The dissenting opinion noted, *inter alia*, that even a six to eight week delay was not unreasonable where the State had shown no need for extraordinary expedition, that justice and fair play are more important considerations than expedition and judicial convenience, and that the trial judge's voluntary disclaimer of prejudice indicated that "he was at least subconsciously influenced by the very thing he disclaimed". See Appendix B.

The Court of Appeals of Maryland granted certiorari and affirmed by a vote of 4 to 2. The

majority found no abuse of discretion and held that the question of prejudice is not a factor until error has first been demonstrated. The Court noted, parenthetically, that "Harford County is not sufficiently populous and does not have sufficient litigation for there to be a jury in the courtroom every day of the week".

The dissenting judges noted the failure of the trial court to make any inquiry of the witness as to inconvenience, that any unavailability of jurors should not inure to the detriment of the Petitioner" since he moved with dispatch to make known to the court his changed circumstance" and that the lack of prejudice was used by the trial judge as a means of dismissing Petitioner's contentions. The dissent concluded by saying that the majority "today invites defendants to pray jury trials in all cases in order to preserve their constitutional right thereto. I can envision no greater impediment to the orderly administration of justice". See Appendix A.

Petitioner asserts that the federal question was raised herein by his request for a jury trial before the commencement of trial before the trial judge and by timely appeal to the Court of Special Appeals of Maryland and by his petition for certiorari to the Court of Appeals of Maryland which was entertained by that Court.

REASONS FOR GRANTING THE WRIT

I.

THERE IS A FEDERAL QUESTION OF SUBSTANCE INVOLVING THE REGULATION OF SIXTH AMENDMENT RIGHTS BY THE STATE.

This case concerns the right to a trial by jury which is fundamental constitutional right. See, e.g., Duncan v. State of Louisiana, 391 U.S.

145, 88 S.Ct.1444 (1968). Research by counsel has not revealed any decision by this Court indicating with precision the extent to which that federal right may be denied by the States by procedural rules regulating the timeliness of a request for a change in the mode of trial and the factors which may be constitutionally considered or the weight to be accorded to such factors.

Such matters are directly raised herein. The trial court found that Petitioner's motion was "made in good faith". That finding has not been challenged by the State or the Appellate Courts of Maryland. Granted the premise that a criminal defendant makes a good faith motion on the day of trial to have his guilt or innocence determined by a jury, what are the bases upon which a State may withhold the Constitutional right to such a trial?

The majority of the Court of Appeals focused upon the witness from out of state, public criticism by witnesses who are "sent home to return at a later date" and concluded that any prejudice to a criminal defendant in denying his right to a jury trial is only a factor to be considered if the defendant first establishes that error in denying that right is established. The quantum of that burden and the scope of the "abuse of discretion" doctrine have not been articulated by the Maryland Court in any meaningful way.

As opposed to the majority, the dissenting judges have indicated -- at least to Maryland lawyers -- that they must pray jury trials in all cases in order to preserve their constitutional right thereto. Counsel can scarcely ignore this statement in Maryland for fear of providing his client less than adequate representation.

The particular facts herein, discussed in II, also demonstrate that this is a desirable case for review of a substantial federal right.

II.

PETITIONER WAS IN FACT DENIED HIS SIXTH AMENDMENT RIGHT TO A TRIAL BY JURY AS GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES.

Under the particular facts herein, Petitioner was impermissably denied his right to a trial by jury. Petitioner alleges that his request to a change for trial by a jury occurred in this fashion:

1. Petitioner's request was made on the morning of trial but before the trial actually commenced.

2. The request was bottomed upon a change in the posture of the case, to-wit, that the "co-defendant" Deal was going to testify against the Petitioner.

3. "early of last week" Petitioner's counsel was notified by the State that Deal was "pleading guilty to two counts of the indictment".

4. "it was not until today that we finally learned the extent of the co-defendant's testimony in this case and how deeply prejudicial it is and I got this from Mr. Walker and I had no previous opportunity to talk to him ..."

5. The State opposed the request saying, in part, "I believe the court's calendar is now dealing with or has been filled up approximately six weeks in advance. It usually is which would mean a six or eight weeks delay before the trying of this case." The

State also pointed to a witness from Pittsburgh who was "flown in" at the expense of the State. Obviously, this reference was to James Lees, who, when he testified, indicated that he could return at a later date. (emphasis added)

6. Counsel for the Appellant had stated that "I understand that there is some question of a witness and perhaps we could stipulate to that one witness who I understand is from out of town, what his testimony would be."

It was in this context that the trial judge stated that there was a "very late request for the change", if it had been made by the "end of last week" the clerk could have had a jury available, the State had paid expenses for a witness from Pittsburgh, the case "would not be heard for six to eight weeks from now" and there would be an inconvenience to a witness and although the court had no doubt "that the motion is made in good faith" (emphasis supplied) the trial judge then concluded by saying that discretion "would best be exercised by denying the motion and proceeding with the court trial because frankly the court can't see there is any real prejudice to Mr. Mathias." Earlier the court had said it was "not going to determine the case on whether or not the co-defendant pleaded guilty. The court is going to determine the case on evidence as it's presented to it and argument by counsel ..."

The trial judge held no evidentiary hearing on this matter. He assumed the accuracy of the State's representation to the effect that "I believe the court's calendar ... has been filled up approximately six weeks in advance." No inquiry

was made to any clerk or assignment commissioner. The Circuit Court for Harford County, Maryland is staffed by three judges. See Courts and Judicial Proceedings Article, Md. Code, Sec. 1-503. No inquiry was made as to the availability of another judge and jury panel.

The majority of the Court of Appeals stated -- with no evidentiary support -- that "Harford County is not sufficiently populous and does not have sufficient litigation for there to be a jury in the courthouse every day of the week". Nonetheless, it is sufficiently populous to have three resident judges and, according to the trial judge, a jury available on "even a day or two notice" while it may not be Maryland's most populous county, Harford County had an estimated population of 134,200 in 1976. See Maryland Manual 1977-1978, p. 414. Maryland's highest court based its decision on mere assumptions without any evidence in the record below.

Even assuming a delay of six weeks, such a delay was not unreasonable when it is placed against the fact that the time from indictment to the first trial date was almost eight months.

Inconvenience to the witness was not in fact shown to exist. Indeed, there is uncertainty as to his real place of residence but in any event he showed no unwillingness to return at a later date.

Finally, Petitioner asserts that the Maryland Courts improperly placed the burden upon him to show that he would be prejudiced by a denial of his request for a jury. Although the Court of Appeals held that the question of prejudice, as opposed to harmless error, only arises if error is first found it is clear that the trial judge used the lack of prejudice as an important factor in determining to deny Petitioner's motion. See

Appendix C. This error was compounded by the majority of the Court of Special Appeals when it affirmed with the observation that "no prejudice to appellant was shown". Appendix B. These decisions raise a serious constitutional question as to whether a defendant must establish prejudice in order to have a change in the mode of trial. See, e.g., the concurring opinion of Mr. Justice Stewart in Chapman v. State of California, 386 U.S. 18, 42-44, 87 S.Ct.824, 836-838 (1967) enumerating cases in which the harmless error rule was held not to be applicable with respect to certain constitutional rights (involuntary confessions, denial of counsel, jury prejudice, discrimination in selection of juries and instructing a jury as to an unconstitutional presumption).

Even if prejudice is a factor it is clear that the State has the burden to demonstrate beyond a reasonable doubt that the error did not contribute to the result. Dorsey v. State, 276 Md.638 (1976). This aspect of the matter was never addressed below. The Petitioner can do no better than to quote from the dissenting opinion of Judge Lowe in the Court of Special Appeals herein:

"Finally, in regard to the 'prejudice' to appellant, the majority points out that the trial judge assured appellant that he would decide the case solely on the law and the evidence, and not determine his guilt on 'whether or not the co-defendant pleaded guilty. Despite our self-serving assurances to the public from time to time that judges are superior beings with a 'multitude of admirable qualities' and thus not liable to human frailties, Williamson v. State, 25 Md.App.338, 341, we who have taken the cloth are hardly reassured. The fact that the judge felt compelled to volunteer such

an assurance indicates that he was at least subconsciously influenced by the very thing he disclaimed. If bias or prejudice were truly dissipated simply by stating -- or even believing -- that one is not prejudiced, we would have had no need for judicial or legislative efforts to proclaim and enforce equal treatment. I have met very few prejudiced people who recognized their prejudice -- even among judges." 39 Md.App. at 297.

Judge Lowe had commented earlier as to the benefits of a jury of twelve to weigh the suspect testimony of Deal rather than a single jurist "whose very role may have hardened him to the plea bargain procedure". 39 Md.App.294-295. Compare the observations in Ballew v. Georgia, 98 S.Ct.1029 (1978) where a five member jury was held to be impermissably small. As this Court said in Duncan v. State of Louisiana, supra,

"... when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed". 391 U.S.157, 88 S.Ct.1452.

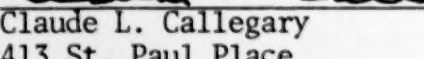
The testimony of Deal and the Appellant was irreconcilable. The former was pointing his finger at Mathias as a supplier while the latter testified to having participated in a charade at the request of his friend. The mode of trial is perhaps the most basic decision to be made in every case. As the Court of Appeals had pointed out in Dorsey v. State, supra,

"... An evidentiary or procedural error in a trial is bound, in some fashion,

to affect the delicately balanced decisional process ..."

CONCLUSION

Wherefore, Petitioner respectfully prays that a writ of certiorari be granted.


Claude L. Callegary
413 St. Paul Place
Baltimore, Maryland 21202
Phone: 301-727-1365
Attorney for Petitioner

APPENDIX A

IN THE COURT OF APPEALS OF MARYLAND

NO. 26

SEPTEMBER TERM, 1978

EUGENE HUGH MATHIAS

v.

STATE OF MARYLAND

Murphy, C.J.
Smith
Digges
Eldridge
Orth
Cole, JJ.

Opinion by Smith, J.
Eldridge and Cole, JJ., dissent.

Filed: November 17, 1978

We shall here hold that a trial judge did not abuse his discretion when he denied the request of an accused on the morning of trial to change his election of a court trial to that of a jury trial.

In a court trial in the Circuit Court for Harford County appellant, Eugene Hugh Mathias (Mathias), was convicted of distribution of a controlled dangerous substance and conspiracy to distribute such substances. A divided panel of the Court of Special Appeals affirmed the conviction in Mathias v. State, 39 Md.App. 291, 384 A.2d 482 (1978). We granted the writ of certiorari in order that we might consider the issue here presented.

For purposes of the case before us, the facts are relatively simple. Mathias and a codefendant were arraigned on October 5, 1976. At that time Mathias entered a plea of not guilty and elected to be tried by the court. Trial originally was scheduled for June 9, 1977. It was postponed to June 29, 1977, because of the trial schedule of Mathias' attorney. When the case was called for trial on June 29 counsel for Mathias advised the court that Mathias "wish(ed) to elect not a court trial but a jury trial ..." He then proceeded to set forth the reasons for the request:

"(I)t was early of last week that we were notified by the State's Attorney's Office, by Mr. Coleman that the codefendant in this case was pleading to two counts of the indictment."⁽¹⁾

(1) It thus is worthy of note that June 29, 1977, was a Wednesday. Therefore, if it were "early (in the previous" week" that counsel for Mathias knew that the codefendant was pleading guilty, then it follows that this was more than a week before the trial date since Wednesday presumably would be regarded as in the middle of the week.

At the time of the original arraignment both defendants pleaded not guilty and elected to be tried by the court. After notifying my client of that situation and the fact that the codefendant Deal would be a witness against him, Mr. Mathias then requested me to request the court to withdraw his waiver of jury trial and to request a jury trial on the basis that the testimony of the codefendant is so totally prejudicial to his rights and could be entirely disregarded by a jury, that of this codefendant and in spite of (State v. Jones,) 270 Md.388, (312 A.2d 281 (1973),) the court has discretion to change the waiver of a jury trial to a jury trial and that discretion of the court can go in both directions. We are now requesting that the court withdraw the waiver and that we be allowed to have a jury trial. I understand that there is some question of a witness and perhaps we could stipulate to that one witness who I understand is from out of town, what his testimony would be."

Counsel for Mathias said that it was not until the morning of trial that he "finally learned the extent of the codefendant's testimony ... and how deeply prejudicial it (might be) ..."

The State opposed the motion, pointing out that there had been no indication prior to the morning of trial that there would be a prayer for a jury trial, that the clerk "ha(d) prepared the case on the assumption there would be no jury so there (was), in fact, no jury present and available for the court to select a jury th(at) morning and that permitting (Mathias) to have a jury trial

would mean a delay." The State contended that this change in election would mean postponement for six to eight weeks. It was observed that had Mathias "given even a day or two notice" arrangements could have been made to have a jury present that day. (Harford County is not sufficiently populous and does not have sufficient litigation for there to be a jury in the courthouse every day of the week.) The State also pointed out that it had brought a former police officer in from Pittsburgh as a witness.

In denying the request, the trial judge referred to State v. Jones, 270 Md. 388, 312 A.2d 281 (1973). He said:

"Now, when you consider the various facts, one is the very late request for the change, I mean, even a day or two and certainly I believe Mr. Callegary (counsel for Mathias), you were aware of it by the end of last week that a codefendant was going to plead guilty and even if then if you had requested a jury trial the clerk could have had one available. So, the original plea was months ago, of course, the facts were a little bit different and in addition to that the State has a witness coming from Pittsburgh who the State has paid the expenses and those expenses have already been incurred and it's not a certainty that this witness would be available if the case is taken out of the assignment and if the jury trial was granted. It would necessitate taking the case out of the assignment. It would not be heard for six to eight weeks from now and it would certainly be an inconvenience for this witness to come here from Pittsburgh and possibly be required to have to return.

"So, I don't doubt that the motion is made in good faith, Mr. Callegary, certainly I don't have any doubt on that score but I think when you weigh all of the factors that are supposed to be considered, that exercise of discretion in this case would be best exercised by denying the motion and proceeding with the court trial because frankly the court can't see there is any real prejudice to Mr. Mathias. So, I will deny the motion."

Since this case was tried prior to July 1, 1977, then Maryland Rule 741 was applicable.² It states:

². Our Standing Committee on Rules of Practice and Procedure submitted its 53rd Report to us under date of December 30, 1975. See 3: 1 Md. Register 8-39 (January 7, 1976), which recommended extensive revision of the rules applicable to criminal cases. On January 31, 1977, we passed an order adopting the new rules effective July 1, 1977. See 4: 4 Md. Register 235-275 (February 16, 1977). Maryland Rule 735 is currently applicable to election of court or jury trial. Under it the election must "be in writing, signed by the defendant, witnessed by his counsel, if any, and filed with the clerk of the court in which the case is pending." Rule 735 a provides in pertinent part, "After an election has been filed, the court may not permit the defendant to change his election except upon motion made prior to trial and for good cause shown. In determining whether to allow a change in election, the court shall give due regard to the extent, if any, to which trial would be delayed by the change."

"An accused may elect to be tried by jury or by the court. Such election shall be made by the accused in open court when first called upon to plead after he is represented by counsel of record or has waived counsel. If an accused elects to be tried by the court, the State may not elect a jury trial. The court may, in its discretion and for good cause shown, at any time prior to the trial permit the accused to change his election." (Emphasis added).

There is not the slightest suggestion that the trial judge in this case was in any way biased against Mathias. The parties here concede, as indeed they must after our holding in Jones, that the action of the trial court here is to be reviewed upon the basis of whether it was an abuse of discretion. Chief Judge Murphy pointed out for the Court in Jones, 270 Md. at 393, "Under the prevailing rule an accused has no absolute right to withdraw his waiver of a jury trial; whether it will be permitted is a matter committed to the sound discretion of the trial court." He cited a number of cases in support of this proposition together with Annot. 46 A.L.R.2d 919 (1956). To this could be added State v. Lawrence, 216 Kan. 27, 530 P.2d 1232 (1975), decided subsequent to Jones with facts closely approximating those in this case; 3 C. Torcia, Wharton's Criminal Procedure § 437 (1975), 47 Am.Jur.2d, Jury, § 70 (1969), and 50 C.J.S. Juries § 111 at 825 (1947). Accord, Staten v. State, 13 Md.App.425, 283 A.2d 644 (1971); Cole v. State, 12 Md.App. 379, 277 A.2d 248 (1971); and Walter v. State, 4 Md.App. 373, 243 A.2d 626 (1968). L. Orfield, Criminal Procedure From Arrest to Appeal (1947), in discussing waiver of jury trial, comments at 394-95, "It seems sound to leave the matter (of

withdrawal of a waiver) in the discretion of the courts, subject to such rules for applying that discretion as the courts may develop."

Precisely what is meant by an abuse of discretion seems not to have been articulated by this Court. However, some bench marks are to be found. For example, in Washington, B. & A. R. R. v. Kimmey, 141 Md. 243, 250, 118 A.648 (1922), relative to the discretion to be exercised in considering a motion for a new trial, Judge Urner said for our predecessors, "A discretion could not be characterized as sound which wholly disregarded evidence by which its exercise should have been aided." In Horton v. Horton, 157 Md. 127, 133, 145 A. 355 (1929), concerning the discretion of orphans' courts in the case of intestacy to grant letters to a child or to the husband or widow, as the case might be, the Court said, "(I)t means that the court shall actually exercise a discretion, and that it shall make its choice after considering the relative merits and fitness of the applicants, and their respective claims to consideration, and not that it may act without regard to such consideration, solely at its pleasure or caprice." In Lee v. State, 161 Md. 430, 157 A.723 (1931), Chief Judge Bond said for the Court:

"The meaning of discretionary power in a trial court, and the rules governing review of discretionary orders on appeal, have often been stated in vague, loose terms which furnish no exact guidance; but for the purposes of this case it seems to us sufficient to observe only that the judgment and discretion must be exercised in solving the exact problem of the law, upon all the considerations which properly enter into the problem, and form it. For

instance, the discretion being the solution of the problem arising from the circumstances of each case as it is presented, it has been held that the court could not dispose of all cases alike by a previous general rule. Union Bank v. Ridgely, 1 H. & G. 324, 407 (1827)" Id. at 441.

In Jones v. State, 185 Md. 481, 489, 45 A.2d 350 (1946), the Court held that "the exercise of discretion" might "be reviewed if exercised in a harsh, unjust, capricious and arbitrary way." Much more recently Judge O'Donnell said for the Court in Wilhelm v. State, 272 Md. 404, 326 A.2d 707 (1974):

"Lord Halsbury, L. C., in Sharp v. Wakefield (1891) A. C. 173, 179, said:

"Discretion" means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion; according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself." Id. at 438.

We have recognized in other matters that since discretionary rulings by trial judges carry a presumption of validity, the burden of establishing an abuse of discretion in a particular case lies with the appellant. I. W. Berman Prop. v. Porter Brothers, 276 Md. 1, 13-14, 344 A.2d 65 (1975); Francheschina v. Hope, 267 Md. 632, 636-37, 298 A.2d 400 (1973); and Stickell v. City of Baltimore, 252 Md. 464, 471, 250 A.2d 541 (1969). In Northwest'n Nat. Ins. Co. v. Rosoff, 195 Md. 421, 436, 73 A.2d 461 (1950), Chief Judge Marbury observed for our predecessors that discretionary rulings "should only be disturbed where it is apparent that some serious error or abuse of discretion or autocratic action has occurred."

In Jones Chief Judge Murphy referred to the American Bar Association's "Standards Relating to Trial by Jury," Approved Draft (1968), § 1.2 (c) of which provides, "A defendant may not withdraw a voluntary and knowing waiver (of trial by jury) as a matter of right, but the court, in its discretion, may permit withdrawal prior to the commencement of the trial." The commentary accompanying that standard is instructive. It states:

"In a few jurisdictions the defendant may withdraw his waiver of jury trial at any time before the trial. Orfield, Criminal Procedure From Arrest to Appeal 394 (1947). However, the prevailing view, adopted in the standard, is that the withdrawal of a voluntary and knowing waiver of trial by jury lies in the discretion of the court. Annot. 46 A.L.R.2d 919 (1956). The minority view has been rejected because no good reason for allowing the defendant complete power to withdraw his waiver has

been found, while it is apparent that the exercise of such power could often result in delay and inconvenience.

"The standard limits withdrawal with consent of the court to the time prior to the commencement of trial; the cases agree that a motion made after the trial is under way is not timely. Id. at 922. The standard also indicates that whether withdrawal should be allowed rests with the discretion of the court. In this regard, it should be noted that a number of cases have held that withdrawal should not be allowed if the result would be an unreasonable delay in the trial. Ibid." Id. at 39-40.

Although Mathias wishes to distinguish this case from the facts of Jones where there was an apparent attempt on the part of Jones to delay the trial, the law cited in Jones is fully applicable. We shall evaluate the facts here against that law. In Jones Chief Judge Murphy said for the Court:

"Whether intentional or not, we think it apparent that delay of trial can be caused, and justice can be impeded, by last minute motions to withdraw a jury trial waiver. For purposes of determining whether 'good cause' under Rule 741 has been shown to permit the requested change in election, the trial judge should consider, among other things, the reason expressed for making the request, when

the request is made in relation to the time of trial, the lapse of time between the election and the requested change, whether there has been a change of counsel, whether the motion is made in good faith and not to obtain delay, whether the granting of the motion would unreasonably delay trial, impede the cause of justice or the orderly administration of the courts, prejudice the State's case, or unreasonably inconvenience witnesses. Within this framework, the trial judge is vested with wide discretion in deciding whether to permit the requested change in election." Id. at 395-96.

In our evaluation we put aside Dorsey v. State, 276 Md. 638, 350 A.2d 665 (1976), which is cited by Mathias with the argument that "even if prejudice is a factor it is clear that the State has the burden to demonstrate beyond a reasonable doubt that the error did not contribute to the result." This argument stems from the statement of the trial judge, quoted by the Court of Special Appeals, 39 Md.App. at 293-94:

"The court is not going to determine a case on whether or not the codefendant pleaded guilty. The court is going to determine the case on evidence as it's presented to it and argument by counsel as to the law so I can't see first why or in what manner Mr. Mathias can be prejudiced by that fact."

Dorsey is inapposite. It had to do with the standard to be applied in determining whether error was harmless error, error having been found. Here the issue is whether the trial judge has fairly acted in a matter within his sound discretion,

hence, whether there is any error.

It should be borne in mind that whenever there are codefendants in a case there always is a possibility that on the very morning of trial one of those codefendants will change his mind because of stage fright or some other reason and determine to plead guilty, possibly accepting a proposition for a plea bargain previously made by the State. To hold that whenever this takes place and such a codefendant is then going to testify against another codefendant or codefendants such individuals are automatically entitled to change their prior election of a court trial would make a shambles of trial assignments and court administration. It also should be borne in mind that one of the subjects on which the general public severely criticizes lawyers and courts is when they are called to appear as witnesses at a trial and then are sent home to return at a later date.

The State was concerned because it had a witness from out of state who had been brought to the trial at considerable expense to the State. It is true that Mathias offered to stipulate as to the testimony of that witness in the event of a later trial. But there is a difference between personal testimony of a witness in court where the trier of fact may consider the demeanor of the witness in determining credibility and a stipulation that a witness would testify as to certain facts. This is well illustrated by our having pointed out in divorce cases that "the latter portion of Rule 886 (, relative to the opportunity of a trial court to judge the credibility of the witnesses,) is not applicable where the testimony was heard before a court examiner, for the simple reason that the judge did not have the opportunity to observe the witnesses and thus to weigh their credibility." Bartell v. Bartell, 278 Md.12, 23, 357 A.2d 343 (1976), and cases there cited. It is to be noted

that there was no suggestion that the stipulation would include that such testimony was true.

Given the fact that defense counsel had known for about a week that the codefendant was going to plead guilty and thus might well have anticipated that he might testify for the State, the inconvenience to the State's witness from Pittsburgh, the fact that a jury was not available in the Harford County courthouse on the day in question, that permitting the change would have meant postponement of the case for six to eight weeks, and the indication by the trial judge that had the court had notice of even a day or two of the desire to change the mode of trial a jury could have been provided, we find no abuse of discretion on the part of the trial judge.

JUDGMENT AFFIRMED; APPELLANT

TO PAY THE COSTS.

APPENDIX B

REPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

September Term, 1977

No. 860

EUGENE HUGH MATHIAS

v.

STATE OF MARYLAND

Thompson
Lowe
Couch, JJ.

Opinion by Couch, J.

Dissenting Opinion by Lowe, J.

Filed: April 17, 1978

Following a court trial in the Circuit Court for Harford County (Higinbotham, J.), appellant, Eugene Hugh Mathias, was found guilty of distribution of a controlled dangerous substance and conspiracy to distribute a controlled dangerous substance; he was sentenced to four years incarceration on the former and three years concurrent on the latter. From these convictions he appeals, claiming the trial court erred in refusing to allow him to withdraw his previous waiver of a jury trial and forcing him to be tried by the court.

Appellant and a co-defendant were indicted on four counts of violating the Controlled Dangerous Substance laws of the State. Appellant was arraigned on October 5, 1976, at which time he pled not guilty and elected a court trial (he does not contend here that his waiver of a jury trial was anything but voluntary and intelligent). The court trial was set for June 9, 1977, but was postponed, at appellant's request, until June 29, 1977. On the morning of trial appellant, through his attorney, sought leave to change his trial election and to be tried by a jury. At the hearing on the motion it developed that early the previous week the State's Attorney's office notified appellant's attorney that the co-defendant was pleading (apparently guilty) to two counts of the indictment. It was further stated that it was not until the morning of trial that appellant's attorney talked to the attorney for the co-defendant and learned that the co-defendant was going to testify for the State and how deeply prejudicial this testimony was. The State opposed appellant's motion on the ground that no jury was available, that trial would have to be delayed from six to eight weeks, and that the State had brought a former police witness in from Pittsburgh (and thus already incurred certain expenses). We note

that, at the motion hearing, appellant's counsel stated that perhaps they could stipulate to what the out-of-state witness's testimony would be. The court felt that appellant had not shown good cause, that there would be inconvenience to the out-of-state witness and expense to the State, and, consequently, denied appellant's request. The ensuing trial resulted in appellant's conviction.

It goes without saying that one charged with a criminal offense may elect to be tried by a jury. Maryland Declaration of Rights, Article 5; Sixth Amendment to the United States Constitution. It is also true that a defendant, in a criminal case, may waive his right to a jury trial. *State v. Zimmerman*, 261 Md. 11, 273 A.2d 156 (1971). Further, it is clear that a defendant's election to be tried by the court may be withdrawn. Maryland Rules of Procedure 741 (now 735) provides in part, "The court may, in its discretion and for good cause shown, at any time prior to the trial permit the accused to change his election." Thus our review here is limited to a determination of whether the trial judge abused his discretion in denying appellant's request for a jury trial, made on the morning of trial, which trial had been scheduled for some eight months.

Chief Judge Murphy, speaking for the Court of Appeals in *State v. Jones*, 270 Md. 388, 395, 396, 312 A.2d 281 (1973), stated:

"For purposes of determining whether 'good cause' under Rule 741 has been shown to permit the requested change in election, the trial judge should consider, among other things, the reason expressed for making the request, when the request is made in relation to the time of trial, the

lapse of time between the election and the requested change, whether there has been a change of counsel, whether the motion is made in good faith and not to obtain delay, whether the granting of the motion would unreasonably delay trial, impede the cause of justice or the orderly administration of the courts, prejudice the State's case, or unreasonably inconvenience witnesses. Within this framework, the trial judge is vested with wide discretion in deciding whether to permit the requested change in election."

Applying these standards to the instant case, we are not persuaded that the trial court abused its discretion in denying appellant's request. Certainly there was inconvenience to the State and to the out-of-state witness, there had been a week's notice of the change of position of the co-defendant, there was interruption of the orderly administration of the court, and no prejudice to appellant was shown. We note, in this latter respect, that the trial judge stated:

"The court is not going to determine a case on whether or not the co-defendant pleaded guilty. The court is going to determine the case on evidence as it's presented to it and argument by counsel as to the law so I can't see first why or in what manner Mr. Mathias can be prejudiced by that fact."

JUDGMENTS AFFIRMED.
APPELLANT TO PAY COSTS.

REPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

NO. 860
September Term, 1977

EUGENE HUGH MATHIAS

v.

STATE OF MARYLAND

Thompson,
Lowe,
Couch,
JJ.

Dissenting Opinion by Lowe, J.

Filed: April 17, 1978

State v. Jones, 270 Md. 388, relied upon by the majority, turned upon facts clearly indicating that Jones had manipulated the system for purposes of delay. He had originally exercised his right to a jury trial but being unhappy with the jury selected, had, on the day of trial, waived the jury for a court trial, then obtained an immediate postponement followed by another subsequently granted. When again he came to trial, he chose that moment to fire his court appointed counsel on grounds relating to the attorney's selection of the original jury rejected two months previously. Following several delays encompassing over seven months thereafter, Jones was finally called to trial with his new attorney, and at this juncture asked for a jury trial and to withdraw his former waiver.

The Court of Appeals, quoting out-of-State cases with approval, gave every indication that a court "should permit" application for withdrawal of a waiver when "seasonably made" if "good cause" is shown under Md. Rule 741 (now Rule 735). It was apparent there, however, that Jones neither had good cause nor had he seasonably applied.

- good cause -

Upon learning on the day of trial that his codefendant was trading his own freedom for testimony prejudicial to appellant, appellant Mathias acted precipitously to withdraw his waiver and exercise his constitutional right to have a jury of twelve of his peers weigh the suspect testimony (arguably purchased with judicial leniency by the prosecutor), rather than have such testimony weighed by a single jurist whose very role may have hardened him to the plea

bargain procedure. If such a reason does not constitute "good cause" to withdraw a jury waiver, as the majority described "good cause" in its quote from State v. Jones, 270 Md. 388, 395-396, I am at a loss to determine what would fulfill the definition.¹

- seasonable application -

Although the week before trial appellant may have suspected that his codefendant's guilty plea was the result of a plea bargain which would enure to appellant's detriment, he is hardly chargeable with that knowledge, especially in light of the fact that the codefendant could not be compelled to testify until his own judgment was final. McClain v. State, 10 Md.App.106, 114, cert. denied, 259 Md. 733. Although appellant's counsel was notified the week previous to trial that the codefendant would plead guilty, there is no evidence that appellant, or his counsel, was advised that the codefendant would testify voluntarily against appellant. Thus, on the day appellant became aware of the underlying cause for his need for the jury, he sought it promptly.

¹ To agree with appellant that bargained testimony may be more acidulously viewed by laymen than by judges is not to question judicial integrity. It simply acknowledges that judges are used to such "deals -- perhaps too used to them. Added to that is appellant's numerical chance of having such testimony leave a bitter taste with the factfinder; a jury trial increases that possibility from one to twelve over a court trial.

That was certainly a "seasonable" application.²

- impede justice, unreasonable
delay, prejudice to the State -

But seasonable application to withdraw the waiver, even coupled with good cause, may not be enough. Jones tells us that whether the motion was made "timely" depended upon whether it was made at a time when the granting thereof would result in a delay of trial, impede justice, prejudice the State, or inconvenience witnesses. Id. at 394. As pointed out by the majority, the State argued that a six to eight week delay would be required and presumably that this was unreasonable. It further contended that it was prejudiced by the expense of bringing a witness to testify from his present home in Pittsburgh and that this witness -- a former police officer -- would be inconvenienced by a second day's journey.

The question is whether these are inordinate rather than expected impediments following a continuance. Is a six to eight week delay "unreasonable" where the State has shown no need for extraordinary expedition? Is justice impeded by a second State-paid carfare from Pittsburgh to Harford County? If so, it should be noted that appellant qualifiedly offered to stipulate that witness's testimony if given his right to jury trial. This offer was presumably not considered, explored or mentioned by the trial judge when he denied the jury trial.

² Even if we charged appellant with the duty to inquire immediately as to the extent of his co-defendant's plea bargain upon being told of his sudden change of plea, I would be hard pressed to hold that a lapse of one week made the application untimely.

Too often our system is in such a hurry that its primary purpose is blurred by desire for unnecessary expedition and judicial convenience. Justice and fair play are by far more compelling considerations -- certainly more so than the not unreasonable inconvenience of a single witness, or the hardly inordinate State's expense required to bring that witness back from his present Pittsburgh home.

The Court of Appeals, in Jones, recognized that the Rule 741 discretion was not absolute, and should be liberally granted ("... the court should permit it.") and restrictively withheld:

"... the fundamental ... right of trial by jury will best be protected ... if the withdrawal of the waiver to such a trial is refused by a court only when it is not seasonably made in good faith, or is made to obtain a delay, or it appears that some real harm will be done to the public, i.e., the State, such as unreasonable delay or interruption of the administration of justice, real inconvenience to the court and the State, or that additional expense to the State will be occasioned thereby." (emphasis added). Jones, supra, at 394, quoting Floyd v. State, 90 So.2d 105, 106.

Clearly in this case application to withdraw was made as soon as the cause was manifest, despite it having been a "last minute motion". If Jones is interpreted to permit denial of all withdrawal applications made on the date of trial, regardless of good cause or seasonableness vis-a-vis the knowledge of that cause, the remaining

high-sounding intonations of justice, couched in obligatory verbs and adjectival imperatives, is reduced to a mouthing of platitudes. Jones obviously means more than that.

Finally, in regard to the "prejudice" to appellant, the majority points out that the trial judge assured appellant that he would decide the case solely on the law and the evidence, and not determine his guilt on "whether or not the co-defendant pleaded guilty." Despite our self-serving assurances to the public from time to time that judges are superior beings with a "multitude of admirable qualities" and thus not liable to human frailties, Williamson v. State, 25 Md.App.338, 341, we who have taken the cloth are hardly reassured. The fact that the judge felt compelled to volunteer such an assurance indicates that he was at least subconsciously influenced by the very thing he disclaimed. If bias or prejudice were truly dissipated simply by stating -- or even believing -- that one is not prejudiced, we would have had no need for judicial or legislative efforts to proclaim and enforce equal treatment. I have met but very few prejudiced people who recognized their prejudice -- even among judges.

I must respectfully dissent.

APPENDIX C

ORAL OPINION OF THE CIRCUIT COURT

FOR HARFORD COUNTY, MARYLAND

The right to a jury trial is established by Rule 741 and once election has been made as it was made in this case, upon the arraignment for a court trial then it's within the discretion of the court as to whether or not to permit election for a court trial to be withdrawn and the jury trial to be substituted and there's a case with which the court is familiar, State of Maryland versus Jones in 270 Maryland 388 which sets up certain standards when a situation arises as it has arisen today. That is a case where the same type of situation arose before Judge Liss who was the trial judge, in which he denied the right to withdraw, proceeded with a court trial rather than a jury trial and after reversal by Court of Special Appeals there was a further reversal of the Special Court of Appeals by the Court of Appeals and they set up certain standards that the court should follow in determining whether there was a right to withdraw and, of course, they pointed out that delay can be caused and justice can be impeded by a last minute motion to withdraw a waiver and, of course, in Harford County we don't have a jury standing by like they do in other jurisdictions by the clerk notifying the jury ahead of time when we expect a jury trial and this case was set on the basis that we would not have a jury trial and the only reason Mr. Mathias is now -- he now finds a co-defendant who will testify in the case is going to plead guilty but that would have no effect on the court. The court is not going to determine a case on whether or not the co-defendant pleaded guilty. The court is going to determine the case on evidence as it's presented to it and argument by counsel as to the law so I can't see first why or in what manner Mr. Mathias can be prejudiced by that fact.

Now, when you consider the various facts, one is the very late request for the change. I

mean, even a day or two and certainly I believe Mr. Callegary, you were aware of it by the end of last week that a co-defendant was going to plead guilty and even if then if you had requested a jury trial the clerk could have had one available. So, the original plea was months ago, of course, the facts were a little bit different and in addition to that the State has a witness coming from Pittsburgh who the state has paid the expenses and those expenses have already been incurred and it's not a certainty that this witness would be available if the case is taken out of the assignment and if the jury trial was granted. It would necessitate taking the case out of the assignment. It would not be heard for six to eight weeks from now and it would certainly be an inconvenience of this witness to come here from Pittsburgh and possibly be required to have to return.

So, I don't doubt that the motion is made in good faith, Mr. Callegary, certainly I don't have any doubt on that score but I think when you weigh all of the factors that are supposed to be considered, that exercise of discretion in this case would be best exercised by denying the motion and proceeding with the court trial because frankly the court can't see there is any real prejudice to Mr. Mathias. So, I will deny the motion. Mr. Cobb, do you have an open statement, do you wish to make one?